IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1787

WAYNE BARBER,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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This is a Petition for WAYNE BARBER for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on March 12, 1979, refusing to reverse Mr. Barber's conviction for unlawfully carrying a fire-arm during the commission of a felony in violation of Title 18, United States Code § 924(c)(2). The United States Court of Appeals for the Ninth Circuit ruled that

sufficient evidence was presented to prove that Barber was carrying a firearm during the time he was committing a federal felony. Specifically, the Court found that the word "carries," as used in the statute encompassed Barber's conduct of mere transportation of the weapon.

OPINIONS BELOW

To the Petitioner's knowledge, the Opinion in the United States Court of Appeals for the Ninth Circuit, affirming Petitioner's conviction, has not been officially or unofficially reported as yet. (A copy of said Opinion is attached to the Appendix hereto.)

JURISDICTION

1. On November 16, 1977, the Federal Grand Jury for the Southern District of California returned a Four-Court Indictment against Petitioner Barber and three other persons charging violations of 21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. § 924(c)(2).

2. On February 28, 1978, trial commenced before the Honorable Howard B. Turrentine, United States District Judge. After a three-day trial, the jury returned a verdict of guilty on all counts. On April 17, 1978, Petitioner was committed to the custody of the Attorney General for a period of three (3) years to run concurrently on Counts One and Two, and a period of one (1) year on Count Four to run consecutively with Counts One and Two. It was further ordered that Petitioner serve a Special Parole Term of five (5) years as prescribed under Title 21, U.S.C. § 841(b)(1)(A). Petitioner thereafter filed a timely Notice of Appeal.

3. On March 12, 1979, the United States Court of Appeals for the Ninth Circuit affirmed Barber's conviction and on May 2, 1979, Barber's Petition for Rehearing and Suggestion for Rehearing In Banc was denied by said Court.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Government present sufficient evidence to establish the essential elements of the offense to sustain a conviction under 18 U.S.C. § 924(c)(2)?

2. Does the word "carries," as used in the statute, encompass the conduct of mere transportation of the weapon?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Title 18, U.S.C. § 924(c). "Whoever -- (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States -- shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprison-

ment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, not withstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

2. Title 21, U.S.C. § 841(a)(1).

3. Title 21, U.S.C. § 846.

The foregoing statutes have been set forth in the Appendix attached hereto.

STATEMENT OF THE FACTS

On October 26, 1977, Special Agent Philip Roberts, while acting in an undercover capacity, was introduced to co-defendant CHARLES LOUIS DANIELS by a confidential informant in Marina Del Rey, California. In the ensuing conversation, Daniels indicated that he had a number of connections for cocaine and that he believed he could obtain a connection that could provide Agent Roberts one or two-pound quantities of cocaine on a regular basis.

Agent Roberts again met with Daniels on November 6, 1977, and was informed that Daniels had contacted his people in San Diego and that his people had cocaine available at the price of $26,000 per pound. When asked how soon he could consummate the deal, Agent Roberts indicated that he would be ready toward the end of the week. Agent Roberts also tentatively agreed to pay Daniels $2,000 for every pound that he purchased from Daneil's people and to give Daniels one ounce of cocaine out of the first transaction.

Thereafter, Agent Roberts and Daniels met on November 9, 1977, and when informed that his people had two pounds of cocaine available for sale, Agent Roberts agreed to fly to San Diego on November 10, 1977, to make the purchase.

Prior to meeting with Daniels on November 10th, Agent Roberts arranged for DEA agents to fly to San Diego in a private aircraft and set up surveillance with San Diego DEA agents at the airport. Arrangements were also made to provide $52,000 previously recorded official funds. Agent Roberts and the informant subsequently met Daniels at his apartment in Marina Del Rey and the three flew to San Diego arriving at approximately 8:30 p.m.

Upon arrival, the informant was told to find a place somewhere in the airport and just wait until the transaction had been completed. Agent Roberts and Daniels then walked to the main area of the terminal and Agent Roberts stated that he was going to proceed, via cab, to the Jimsair located acorss the field at Lindberg Airport to verify that his people were there

with that money.[1/] Daniels agreed and indicated that he would check to see if his people had arrived at the airport.

After meeting with the agents and advising them of the events which had occurred, Agent Roberts returned to the PSA terminal and advised Daniels that the money was there and everyting was set to go. Daniels indicated that was fine as his people had arrived. Daniels then led Agent Roberts to the curb in front of the terminal where there was parked a red-colored El Dorado Cadillac with personalized license plates, "Mr. BLF", being dirven by co-defendant Robert Lewis Fultz with a female passenger. Daniels told Fultz that the money was here and that the transaction could be completed at the airport. Fultz replied that he would have to check on the availability of the cocaine and it was agreed that Daniels would go with Fultz and Agent Roberts would wait for their return at the airport.

1/ Agent Roberts had told Daniels earlier that his associates had flown to San Diego in a private aircraft and brought with them the money to purchase the cocaine.

Approximately 30 minutes later, Fultz and Daniels returned to the terminal in the Cadillac where Fultz was introduced to Agent Roberts as "Bobby". Fultz told Agent Roberts to get into the vehicle so they could proceed to a nearby residence where Agent Roberts could look at and test the cocaine. Agent Roberts stated that he was hesitant about leaving the money unattended in the aircraft for a long period of time, and suggested that Fultz follow him over to Jimsair where he could be shown the money and the transaction could be completed there at the airport. Fultz agreed and followed Agent Roberts, who had entered a cab, to Jimsair.

Once at Jimsair, Agent Roberts took Fultz to the DEA aircraft and showed him the $52,000 in recorded funds. Agent Roberts asked Fultz if the price of the cocaine was still $26,000 a pound, and Fultz replied that the price was now $27,000 a pound. Agent Roberts then indicated that he had brought enough money to purchase four pounds of cocaine at the price of $26,000 per pound.

Fultz stated that there was no problem with supplying more than just the one pound of cocaine, however, he did not know if his people would be willing to cut loose with more than one pound at a time. It was agreed that Fultz would check with his people and see if they would allow him to bring back part or all of the cocaine. Fultz then drove off in the Cadillac at about 9:45 p.m., while Agent Roberts wainted with Daniels.

At approximately 10:15 p.m., Agent Roberts observed the red Cadillac closely followed by a red or maroon-colored Jaguar, occupied by two individuals. The two vehicles turned left into Jimsair, made a U-turn, and proceeded into the area of Boom Trenchard's Restaurant toward the parking lot. A few minutes later, the Cadillac, being driven by Fultz, returned to where Agent Roberts was standing and Fultz requested Agent Roberts to get into the vehicle so they could proceed to look at the cocaine. Agent Roberts agreed and the two traveled about a block away where they parked a short distance behind the Jaguar. Fultz

told Agent Roberts to remain in the Cadillac and Fultz then walked to the passenger side of the Jaguar where he had a minute or two discussion with the two occupants. Fultz then motioned for Agent Roberts to come up to the Jaguar.

Agent Roberts walked to the Jaguar at which time Fultz opened the right rear door and indicated for him to get in the vehicle. Seated in the right-hand seat was co-defendant MICHAEL ANTHONY LANGLEY and in the driver's seat was appellant. Agent Roberts asked both Langley and appellant if they had the pound of cocaine, but neither responded. After a short period of time, Langley turned approximately 90 degrees in his seat, placed his right hand underneath his coat towards his left armpit, and took a green-colored shaving kit and placed it where Agent Roberts could reach it. Agent Roberts then opened the kit and observed a clear plastic bag containing a white powder which tested positive for cocaine. Stating that it looked good to him, Agent Roberts asked about completing the transaction while placing the pouch back on

the center console between Langley and appellant. Fultz then opened the door to allow Agent Roberts to exit the vehicle and he then drove Agent Roberts back to Jimsair in the Cadillac.

Once back at Jimsair, Fultz told Agent Roberts to count out enough money for one pound of cocaine and to then return to the vehicle where they would drive a short distance and complete the transaction away from the airport. Agent Roberts proceeded to the aircraft and advised the agents of what had occurred.[2/] He then told the agents that he was going to go back to Fultz's vehicle and try to persuade him to make the transaction at Jimsair. Agent Roberts did go back to the Cadillac and put his proposition to Fultz, who stated he would leave and see if his people would agree to do the transaction at Jimsair. Fultz also stated that when he returned, he would back his

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2/ Agent Roberts gave the agents a description of the Jaguar, stated that he had tested the cocaine in the Jaguar, and indicated he believed one of the suspects might be armed.

vehicle into the area[3/] and signal, with flashing lights, for Agent Roberts to proceed out to the Cadillac with the briefcase containing the money.

At approximately 10:30 p.m., Fultz returned to Jimsair and, as he had previously stated, backed the Cadillac into the gate area and kept the motor running. Agent Roberts then proceeded out to the Cadillac with an empty briefcase. When Agent Roberts asked Fultz, who was in the driver's seat, if he had the pound of cocaine, Fultz indicated for him to get into the vehicle so that he could count the money. Agent Roberts responded that he wanted to see the pound first to make sure that it had not been switched from the one he had tested in the Jaguar. Fultz then motioned to the backseat of the Cadillac and Agent Roberts observed Langley lying on the floor with an article of clothing covering the top portion of his face. After removing this article of clothing, Langley placed his left hand up

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3/ Fultz stated that because of the small area, he wanted to be able to leave the scene quickly if anything went wrong.

and out the window with the green shaving kit while he placed his right hand in his waistband and held it there.

Agent Roberts removed the plastic bag containing the cocaine and stated that he was going back to the aircraft to test the cocaine and if it was the same he had tested in the Jaguar, he would return with the money. Agent Roberts then began walking away from the Cadillac. As Fultz yelled for him to get back into the car, Agent Roberts gave the arrest signal. The Cadillac left the area at a high rate of speed and was stopped a short distance away by the DEA agents.

When Agent Conklin arrived at the scene, Fultz was behind the driver's seat and Langley was in the rear seat. Agent Conklin observed Langley wearing a shoulder holster during the pat-down search of him. When Agent Conklin observed the shoulder holster did not contain a weapon, he entered the Cadillac and found a .357 magnum revolver on the floorboard right behind the front seat.

After an All Points Bulletin had been issued for the Jaguar, California Highway Patrol Officer Robert Bardwell spotted the Jaguar and stopped it near the intersection of I-15 and State Route 163. When the DEA agents arrived at the scene, they took custody of appellant and found a .38 Derringer and holster in the glove compartment box.

Officer Jeannie Walsh, Licensing Supervisor for the San Diego County Sheriff's Department, testified that neither Langley nor appellant had been issued a license to carry a concealed weapon. Robert Bolton, Special Agent with the Bureau of Alcohol, Tobacco and Firearms, testified that those weapons were operable.

REASONS WHY THE WRIT SHOULD BE GRANTED

Since the passage of the Gun Control Act in 1968, numerous federal court decisions have dealt with the particular subsection in question. Most of these

decisions have concerned the degree of proof necessary to sustain a conviction under 18 U.S.C. § 924(c)(2). In defining the elements of the offense, the courts have primarily focused upon the meaning of "unlawfully" as used in the subsection. No court, however, has previously been faced with defining the word "carries." As the legislative history provides no answer to this question, the courts are thus required to give the word its ordinary meaning. It is submitted that the appellate court failed to follow this established principle of statutory construction in reaching its decision, and that it is therefore necessary that this Court accept the instant Petition in order to provide all the Courts with a proper and correct definition.

ARGUMENT

THE GOVERNMENT FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENTS OF THE OFFENSE ESSENTIAL TO SUSTAIN A CONVICTION UNDER 18 U.S.C. § 924(c)(2)

1) Legislative History

In United States v. Melville, 309 F. Supp. 774 (S.D.N.Y. 1970), the Court provides an excellent discussion of the legislative history of 18 U.S.C. § 924 (c)(2):

> "As it was originally enacted in June, 1968, § 924 of the Gun Control Act contained only three subsections. Subsections (a) and (b) were identical to the present subsections (a) and (b). Subsection (c) was relettered (d) and modified somewhat.
>
> "What is presently subsection (c) of § 924 was an amendment to the Gun Control Act, added on October 22, 1968 by Pub L. 90-618, Title I, § 102, 82 Stat. 1223.

Its provisions were not part of the original Act.

"The following is the history of § 924(c) in its passage through the Congress:

"On July 17, 1968 (approximately one month after the passage of the Gun Control Act) Mr. Casey introduced an amendment to H.R. 17735 (a bill introduced by Mr. Celler on June 10, 1968, basically to tighten some of the gun control legislation which was signed several days later by the President).

"This amendment enumberated certain serious felonies [robbery, assault, murder, rape, burglary, kidnapping or homicide (other than involuntary manslaughter)] and made it a federal crime to 'use or carry any firearm which had been transported in interstate or foreign commerce' during the commission of one of the enumerated felonies. 114 Cong.Rec., 90th Cong., 2nd Sess. 21765-67 (1968).

"Questions were raised about the burden to be placed on the federal courts and the prosecutors by this proposed amendment which would make a federal crime out of the use of a firearm during the commission of state felonies. See, 114 Cong.Rec., at 21770-71, 21778. Hon. Ramsey Clark, then Attorney General, was of the view that such a statute would create serious administrative problems for prosecutors and the courts, and that the federal interest in these essentially local crimes was not great. Moreover, state penalties for the commission of these crimes fulfilled the deterrent purposes of legislation, and the existence of an additional federal offense would not be likely to deter criminal conduct. 114 Cong. Rec. at 21778-9.

"Mr. Casey urged that Congress had the power to enact such a statute because of the effect on interstate commerce. 114 Cong.Rec.

at 21781, 21793. Counsel for the Judiciary Committee likewise thought the commerce power provided a more than adequate jurisdictional basis for the proposed amendment. See, 114 Cong.Rec. at 21826-27.

"Mr. Wyman (114 Cong.Rec. at 21793) queried whether Mr. Casey had ever considered limiting the application of the statute to federal offenses so that 'then it would not be necessary to say that the gun had to be transported in interstate commerce'. Mr. Casey was of the view that there would be no need to prove any connection with interstate commerce to support federal jurisdiction under his proposal.

"Eventually, Mr. Wyman introduced a substitute to limit the bill to crimes 'constituting a felony by Federal law'. 114 Cong.Rec. at 21802. Mr. Minishall proposed the same thing, adding that 'whoever uses a firearm in the commission of a federal felony' (emphasis

added) would be liable for additional punishment. 114 Cong.Rec. at 21803.

"On July 19, 1968, Mr. Poff introduced a substitute amendment for the Casey amendment in the language which now appears as § 924(c)(1) and (2) of Title 18, 114 Cong.Rec. at 22231.

"The purpose of the Poff amendment was 'to persuade the man who attempted to commit a Federal felony to leave his gun at home'. 114 Cong.Rec. at 22231.

"Mr. Poff explained the reason for omitting state felonies from the scope of his amendment (Cong. Rec. at 22231):

> First, I do not want to put upon the federal prosecutor the evidentiary burden of proving that the firearm moved in interstate commerce in order to establish federal jurisdiction in each individual case. Every federal felony defined in the code already has its own jurisdictional base.

The other reasons which he gave, were, the terrible burden that inclusion of state felonies would put upon the case load of the federal investigative and prosecutive apparatus; and the policy questions in covering state crimes into federal offenses on such a massive scale. 114 Cong.Rec. at 22231. See also remarks of Mr. Celler at 22235.

"Further debate on the relative merits of the Poff and Casey amendments centered on the amount of penalty and whether it should be mandatory. The House eventually passed the Poff amendment. 114 Cong.Rec. at 22248. It was enacted into law on October 22, 1968, as part of Pub.L. 90-618, 82 Stat. 1213." 390 F.Supp. at 777-778.

While numerous courts have since discussed the legislative history of § 924(c), that discussion has primarily focused upon the meaning of "unlawfully" as used in

subsection (c)(2). In United States v. Ramirez, 482 F.2d 807, cert.den., 414 U.S. 1070, 94 S.Ct. 581 (1973), the Second Circuit reasoned that the location of the adverb "unlawfully" signified an intention on the part of Congress to modify the phrase "carries a firearm." A common sense reading of the statute, therefore, led the Court to conclude that there is no violation of § 924(c)(2) unless the carrying of the firearm is unlawful. The legislative history of the statute, the Court reasoned, supported this conclusion. (See discussion, 482 F.2d at 813-814.) In United States v. Howard, 504 F.2d 1281 (1974), the Eighth Circuit expanded upon the reasoning of Ramirez by concluding that the essential element of "unlawfully" may be determined by resorting to any law, federal, state, or local.[4/] Additionally, the Howard court concluded that another essential

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4/ Both these holdings have been adopted by the Ninth Circuit in United States v. Akers, 542 F.2d 770 (1976), and United States v. Garcia, 555 F.2d 708 (1977).

element of the offense was the concurrent commission of a federal felony. (504 F.2d at 1287.) Therefore, before a conviction under 18 U.S.C. § 924(c)(2) can be sustained, the Government must establish both that the carrying of the firearm was unlawful and that the carrying of the firearm was during the concurrent commission of a felony.

2) Definition of "carries"

Since the legislative history provides little aid in resolving the issue presently before the Court, it is necessary to look at the language of the statute as the best and most reliable index of its meaning. In so doing, the Court must follow the established principle of statutory construction that when Congress does not define an ordinary term, the presumption is that the word is used in the ordinary dictionary sense. National Labor Relations Board v. Coca Cola Co., 350 U.S. 264, 268-269, 76 S.Ct. 383 (1956). Thus, absent persuasive reasons to the contrary, Courts are required to give statutory words their ordinary meaning.

Banks v. Chicago Grain Trimmers Ass'n., 390 U.S. 459, 465, 88 S.Ct. 1140 (1968); see also, Burns v. Alcala, 420 U.S. 575, 95 S.Ct. 1180 (1975); Ruiz v. Morton, 462 F.2d 818, 820 (9th Cir.) aff'd., 415 U.S. 199, 94 S.Ct. 1055 (1972).

Webster's New Collegiate Dictionary, Copyright 1977 by G. & C. Merriam Co., defines the word "carry," in one sense, to mean: "To wear or have on one's person. To hold or bear. To act as a bearer." Used in the active transitive sense, the word "carry" has been said to connote transportation, but when used in the general sense of carrying arms or carrying weapons, the word means "going armed, wearing weapons." In 94 Corpus Juris Secundum at Page 491, a similar definition is found:

> "The word 'carry' in ordinary usage means to convey or transport, and this also may be its meaning in statutes denouncing the carrying of weapons. The 'carrying' of a weapon suggests the thought of going armed and of having the weapon readily accessible and available

for use. The word 'carry' within the purview of such statutes usually means simply to bear, or to have on or about the person, and does not necessarily import the idea of locomotion." (Footnotes omitted.)

In California, any person who carries concealed on his person, or concealed within any vehicle that is under his control or direction, any pistol, revolver, or other firearm capable of being concealed on the person, without a license, is guilty of a misdemeanor. (Cal.Pen. Code § 12025.) One of the material elements of the crime of carrying a concealed weapon is, of course, the concealment of the weapon on the person or within a vehicle. With respect to the meaning of "carry", as used in this context, it has, on the one hand, been stated that the use of the word in an accusatory pleading conveys to the defendant the thought of going about armed, as well as the further proposition that he is charged with transporting the weapon with intent to use it as such. This view followed the common

law definition where the offense of carrying concealed weapons involved riding or going about, and not merely holding or possessing a weapon. In Re Bergen, 214 Pac. 521, 61 Cal.App. 226 (1923). On the other hand, the word has been held not to involve locomotion as a necessary element and that, with regard to the carrying of the weapon concealed on the person, it is used in the sense of having it or bearing it on or about the person, and it is necessary to a conviction only that the concealed weapon be so connected with the person that the locomotion of the body would carry with it the weapon as concealed. People v. Smith, 164 P.2d 857, 72 Cal.App.2d Supp. (1946). By the same token, the carrying of a weapon concealed within a vehicle connotes the holding or bearing about a vehicle of a concealed weapon in any way or fashion so connected with the vehicle that the locomotion of the vehicle would carry with it the weapons as concealed. People v. Smith, supra; see also People v. Williams, __ P.2d __, 184 Cal.App.2d 673 (1960). In a prosecution for carrying a firearm concealed within a vehicle under the

defendant's control or direction, the statute does not require that the defendant have the exclusive possession and control of the firearm. People v. Davis 320 P.2d 88, 157 Cal.App.2d 33 (1958).

In a recent California case, People v. Overturf, __P.2d__, 64 Cal.App.3d Supp. 1 (1976), the Court was faced with the difficult task of determining the difference between the terms "carrying" and "having". In a well-reasoned opinion, the Court held the two terms not synonymous, stating at 64 Cal.App.3d at 6:

> "There is a distinct difference in the two concepts. Speaking generally in the context of statutes concerned with firearms, 'carry' or 'carrying' has been said to be used in the sense of holding or bearing arms. (See citations omitted.) We think that 'having,' . . . is to be read in the sense of 'owning, possessing, or keeping,' . . . ."

3) Discussion

Thus, it appears that before one can be convicted of a violation of § 924(c)(2), sufficient evidence must be presented that the violator had a firearm on or about his person during the commission of the felony for which he is being prosecuted for. In the case at bar, there was a total lack of such evidence. The only evidence presented was that after Petitoner had been taken into custody, over an hour since the various drug activities had been completed, a .38 Derringer and holster were found in the glove compartment box. Indeed, the DEA agent who was present in the Jaguar admitted on cross-examination that he had no idea whatsoever whether Petitioner was armed or not during the commission of the drug activities. Assuming, then, the Derringer was in the Jaguar at the time the drug negotiations were going on, and assuming arguendo that Petitioner even knew that the Derringer was in the Jaguar, such evidence would only be sufficient to sustain a conviction for

"having" or "possessing" a firearm during the commission of a felony, but would clearly not be sufficient to sustain a conviction for "carrying" a firearm during the commission of a felony.

This contention is supported by the facts of a number of cases which have dealt with this statute. In United States v. Ramirez, supra, a Luger pistol was seized from the waistband of the appellant's trousers at the time of his arrest. In United States v. Howard, supra, a loaded pistol was seized from the appellant's belt. In United States v. Garcia, 530 F.2d 650 (5th Cir. 1976), a .357 Magnum Colt was removed from the appellant's boot at the time of his arrest. In United States v. Dickson, 558 F.2d 919 (9th Cir. 1977), a fully loaded revolver was seized from the floorboard of the automobile which appellant was driving when arrested. Finally, in United States v. Garcia, supra, the appellant had a firearm in his front pant's pocket when arrested. Petitioner's attorney has not found one case where a person has been convicted of a § 924(c)(2) offense for

merely having control over a vehicle in which a firearm is later found.

Without doubt, one of the purposes of legislation making it unlawful to have or "carry" weapons is to prevent citizens going armed in such fashion as to constitute danger to the public. In Re Bergen, supra, 214 Pac. at 523, 61 Cal.App.2d at 228. In other words, such statutes are designed to minimize the danger to public safety arising from free access to firearms that can be used for crimes of violence. People v. Scott, 151 P.2d 517, 521, 24 Cal.2d 774, 782 (1944). Such was the purpose behind the enactment of the Gun Control Act of 1968 (18 U.S.C. § 921, et seq.), which § 924(c)(2) ultimately became a part of. To effectuate this purpose, the statute created a separate offense for the carrying of a gun during the commission of a federal felony and, at least in the case of second and subsequent violations, imposed a mandatory penalty that would be consecutive to that assessed for the commission of the underlying federal felony. To now be consistent with that purpose,

this Court must give the term "carries" as used in subsection (c)(2), the same literal and strict interpretation that Congress must have intended and which the courts for hundreds of years have followed.

CONCLUSION

For the above-mentioned reasons, Petitioner Wayne Barber respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL PANCER

Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

UNITED STATES OF AMERICA,	MAR 12 1979
Plaintiff-Appellee,	EMIL E. MELFI, JR. CLERK U.S. COURT OF APPEALS
vs.	
WAYNE BARBER,	
Defendant-Appellant.	No. 78-1915
	OPINION

Appeal from the United States District Court for the Southern District of California

Before: ELY and HUFSTEDLER, Circuit Judges, and LYDICK,* District Judge.

HUFSTEDLER, Circuit Judge:

Barber appeals from his conviction for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, and for unlawfully carrying a firearm during the commission of a felony in violation of 18 U.S.C § 924(c)(2). Barber contends

* Honorable Lawrence T. Lydick, United States District Judge, Central District of California, sitting by designation.

that the evidence was insufficient to sustain his conviction for violating 18 U.S.C. § 924(c)(2) because the Government failed adequately to prove that he was "carrying" a firearm "during" the commission of a federal felony within the meaning of the statute, that the Government deprived him of effective assistance of counsel in cross-examining a defense witness, and that the district court erred in refusing the enforce a discovery order.

Roberts, a government undercover agent, arranged to buy a large quantity of cocaine from Barber's co-defendant Daniels. Arrangements were made to complete the sale at the San Diego Airport on November 10, 1977. Co-defendant Fultz agreed to deliver a one-pound installment of cocaine from his suppliers. To inspect the sample, Roberts entered a Jaguar automobile, driven by Barber, and asked Barber, and his passenger, co-defendant Langley, whether they had a pound of cocaine. Langley handed the cocaine to Roberts, who thereafter conducted a field test on the cocaine.

Roberts then left the Jaguar to pick up the purchase money, instructing Fultz to deliver the cocaine to him where Fultz had parked his Cadillac. After Roberts obtained the cocaine from Fultz, he started to walk away with it and with his briefcase of purchase money. Fultz yelled at Roberts, and Roberts gave the arrest signal. After a high-speed chase, Fultz was arrested in the Cadillac. Other surveilling agents saw Barber driving the Jaguar rapidly out of the area with its lights out. Pursuant to an all-points bulletin issued for the Jaguar, Barber was stopped and arrested by California Highway Patrol Officers an hour later. After his arrest, the Jaguar was searched and a .22 Derringer was found in the locked glove compartment. Neither Barber nor his co-defendants has a permit to carry a concealed weapon.

Followed a guilty verdict on the cocaine and gun counts, Barber was given concurrent sentences on the cocaine counts, but his sentence on the gun count was made consecutive to the cocaine sentences.

I

In pertinent part, 18 U.S.C. § 924 (c)(2) provides:

> "(c) Whoever . . . (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment . . . ."

To establish a violation of Section 924(c)(2), the Government must prove that the defendant (1) knowingly (2) carried a firearm (3) unlawfully (4) during the commission of a federal felony.

Although the statute does not expressly mention any mental element in stating the offense, "knowledge" or "willfulness," meaning knowledge of the facts constituting the offense, is ordinarily implied. (Morissette v. United States (1952) 342 U.S. 246, 252; Pena-Cabanillas v. United States (9th Cir. 1968) 394 F.2d 785, 788.) All that is meant by this rudimentary mental element is that the defendant voluntarily and intentionally did the

act or acts charged.[1/] In recognition of this principle, the indictment charging Barber with an offense under Section 924(c)(2) averred that Barber "knowingly" carried the firearm and the jury was accordingly instructed.

To prove that Barber actually knew that the Derringer was in the glove compartment, the Government offered evidence, not only that Barber was driving the vehicle containing the firearm, but also evidence that papers belonging to both Barber and Langley were found in the same glove compartment. Barber tried unsuccessfully to rebut this evidence by the testimony of JoAnne, Barber's former girl friend, who testified that she owned the Jaguar and that she had acquired the Derringer from an unidentified third person who asked her to take the gun for

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1/ Of course, many crimes require highly sophisticated levels of abstraction to engender criminal culpability. (See generally Dubin, Mens Rea Reconstructed, 18 Stan.L.Rev. 332 (1966); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107 (1962).)

repairs. She also testified that she had placed the gun in the glove compartment sometime late in October or the first week in November and that she left the gun in the vehicle when she gave the Jaguar to Mr. Barber to repair the car. The jury did not credit JoAnne's testimoney, which was thoroughly impeached. From the Government's evidence, the jury was entitled to infer that Barber was fully aware of the presence of the gun in the glove compartment. His use of the Jaguar, under circumstances that gave him access to the glove compartment, together with his papers and those of Langley in the compartment with the gun permitted the jury property to infer that he knew that the gun was in the glove compartment.

Barber also argues that the word "carries," as used in the statute, connotes only the concept of bearing the weapon upon one's person or having the gun within his immediate controi. Although Congress never specifically addressed the question whether the term "carries" was intended to encompass "transports" or "possesses," we think

that the ordinary meaning of the term embraces Barber's transportation of the weapon. In ordinary usage, the verb "carry" includes transportation or causing to be transported. Nothing in the legislative history indicates that Congress intended any hypertechnical or narrow reading of the word "carries." (See United States v. Ramirez (2d Cir. 1973) 482 F.2d 807, 813-14.) 2/

Barber next contends that the Government did not produce sufficient evidence to show that he was carrying the firearm during the time he was committing a federal felony. He relies upon the fact that the gun was not discovered until he was taken into custody, about an hour after he participated in the abortive drug sale. Although enough time elapsed

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2/ Although we have not been able to find a case in which this issue was directly raised and decided, we have quoted without disapproval a jury instruction that a "defendant is considered to have carried the firearm if he conveyed, transported or took the firearm with him unlawfully during the commission of a Federal felony." (United States v. Dixon (9th Cir. 1977) 558 F.2d 919, 921, n.1.)

from Barber's drug transaction with Roberts until Barber was taken into custody to permit a third person to put the gun in the glove compartment, the jury had ample evidence before it to conclude that the gun had been in the automobile throughout Barber's drug negotiations and his subsequent flight. If the jury credited that part of JoAnne's testimony that she put the gun in the glove compartment, it could appropriately have concluded that there was no third person involved. Moreover, apart from her testimony, the jury could have inferred that no one other than Barber and Langley would have had a reasonable opportunity to put the gun in the glove compartment during the critical events. After Roberts gave the arrest signal, Barber and his co-defendants were fleeing with officers in hot pursuit. Under these circumstances, the jury could readily have concluded that Barber would not have had either the inclination or the opportunity to acquire a gun and put it in the glove compartment before

he was arrested.[3/]

II

Barber complains that the Government improperly cross-examined JoAnne about her relationship with Barber's trial lawyer.[4/] On cross-examination, the prosecutor brought out the fact that Barber's ex-girl friend JoAnne was living with Barber's trial lawyer at the time of trial. This bizarre circumstance revealed to the jury that JoAnne had more than one reason for bias or prejudice.

3/ The evidence was more than sufficient to prove that Barber's transporting the Derringer in the glove compartment was "unlawful," and Barber does not contend otherwise. The Government proved all the elements of California Penal Code § 12025 (West's 1978 Supp.) that, with exceptions not here pertinent, makes it a crime for a person to carry "concealed within any vehicle which is under his control or direction any . . . firearm capable of being concealed upon the person without having a license to carry such firearm . . ." (See, e.g., People v. Jurado (1972) 25 Cal.App.3d 1027, 102 Cal.Rptr. 498.)

4/ Trial counsel does not represent Barber on appeal

However, we cannot say that there was any governmental impropriety in revealing that ground for bias during cross-examination.

Nothing on the face of this record supports Barber's contention that the Government's impeachment of JoAnne on the ground of her relationship to Barber's trial lawyer deprived Barber of effective assistance of counsel. The Government bore no responsibility for defense counsel's residential arrangements nor for his decision to call JoAnne as a witness in Barber's defense. We have little doubt that the effective cross-examination did not improve defense counsel's stature in the eyes of the jury, but this record supplies us with no basis for accepting Barber's contention that the Government improperly impaired the effectiveness of counsel.[5/]

5/ JoAnne's testimony was also impeached by proving that she had given an entirely different version of the facts to an FBI agent in which she had denied any knowledge of the weapon. Moreover, the evidence also showed that title to the Jaguar was not transferred to JoAnne until long after Barber was arrested.

III

Barber's remaining contentions require only the briefest mention. He claims that the district court abused its discretion in refusing to dismiss the indictment and in refusing a continuance when the Government refused to furnish defense counsel with a copy of a government agent's testimony before the grand jury. Without objection by the Government, the Government had been ordered to submit the names of witnesses whom it intended to call as part of its case-in-chief, and with respect to those witnesses, the Government was to supply the grant jury testimony of each. Agent Hicks' name had appeared on the initial list submitted by the Government. Thereafter, however, the Government decided not to call Hicks; accordingly, the Government did not supply Hicks' grand jury testimony for pretrial inspection by Barber. The order did not compel the Government to produce any witness nor did it order the Government to supply a grand jury transcript with respect to any uncalled witness. The district court found that there had been substantial compliance

with discovery orders; our examination of the record convinces us that the district court was correct.

AFFIRMED.

APPENDIX B

21 U.S.C.

Section 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, a controlled substance.

Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.